Supreme Court, U.S.
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(2)

NO. ____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

ZACHARY WITMAN, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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110 pp

Appendix A - Order of The Pennsylvania Supreme Court denying Mr. Witman's Petition For Allowance of Appeal.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PA	:No.291 MAL 2000
Respondent	:
	:Petition for Allowance
v.	:of Appeal from Order of
	:the Superior Court
ZACHARY WITMAN,	:
Petitioner	:

ORDER

PER CURIAM

AND NOW, this 20th day of December, 2000, the Petition for Allowance of Appeal is hereby DENIED. The Motion for Admission Pro Hac Vice is hereby GRANTED.

TRUE & CORRECT COPY
ATTEST: DEC. 21, 2000

s/ Shirley J. Phipps
Appellate Clerk

Appendix B - Order of The Superior Court of Pennsylvania, dated March 28, 2000.

J.S02037/00

2000 PA Super 92

COMMONWEALTH OF PA	:	IN THE SUPERIOR COURT OF
Appellant	:	PENNSYLVANIA
	:	
v.	:	
	:	
ZACHARY WITMAN,	:	No. 1104 MDA 1999
Appellee	:	

Appeal from the Order in the Court of Common Pleas of York County, Criminal Division, No. 5411 CA 1998.

BEFORE: DEL SOLE, TODD and TAMILIA, JJ.

OPINION BY TAMILIA, J.: **FILED MAR. 28, 2000**

~1 The Commonwealth appeals from the May 7, 1999 Order suppressing certain evidence necessary for the criminal homicide prosecution of appellee, Zachary Witman.

> When the Commonwealth appeals from a suppression order, we follow a clearly

> defined standard of review and consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontracted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Nester, 551 Pa. 157, 160, 709 A.2d 879, 880-881 (1998) (citation omitted). Upon careful and independent review of the record, we find the suppression court's findings of fact to be well supported.

> On October 2, 1998, thirteen year old Gregory Witman was killed in his home in New Freedom, Pennsylvania. Gregory's brother, the [appellee] Zachary Witman, placed a 911 telephone call requesting emergency assistance at approximately 3:17 p.m. EMT, fire, and police personnel responded to the Witman home. EMT and

fire personnel were the first to arrive at the scene. The Southern Regional Police Department arrived at approximately 3:25 p.m. Officer Sean Siggins was the first law enforcement officer on the scene. An EMT approached Officer Siggins and advised him that "he had a crime scene." JOfficer Siggins observed the [appellee] standing in the garage with EMT Weigle. Officer Siggins observed that the [appellee] was in an excited state, and was holding a telephone. Blood was visible on the telephone as well as the [appellee's] hands and shirt. Officer Siggins spoke briefly with the [appellee], and testified regarding that conversation as follows:

> "He [the appellee] at first just said he had to call his mom, he had to call his mom. I requested — I got some information from him, his name, whey we were there. He said that he was home sleeping. He left a key in the door for his brother to get home. He heard a thud downstairs like something was

> getting thrown against the wall, came downstairs, found his brother, and called 911."

After speaking with the [appellee], Officer Siggins walked to the doorway in the garage leading to the laundry room in the house and observed Gregory's body on the laundry room floor.

Chief James Childs arrived at the scene at approximately 3:30 p.m. He met Officer Siggins on the driveway and instructed the officer to conduct a canvass of the neighborhood after he had composed himself. Chief Childs observed Gregory's body from the doorway into the laundry room, then returned to his car to get crime scene tape. He instructed the Deputy Fire Chief to assign a fire fighter to mark a police area. The police area was marked with tape establishing the perimeters of the crime scene and sealing it off from unauthorized persons. A list was maintained upon the instruction of Chief Childs of all who entered the perimeters of the crime scene.

Chief Childs then approached the

[appellee], who "was screeching in a high pitched voice" and indicating that he had to call his mother. Chief Childs also observed blood on the front of the [appellee's] sweatshirt. Chief Childs then went to where EMT Neal was standing near the door and spoke to him concerning what the EMT had observed. EMT Neal indicated that he did not know if there was anyone else inside the house. Chief Childs then conducted a "security sweep" of the premises to determine if anyone was inside.

While conducting the "security sweep" Chief Childs indicated that he saw droplets of blood on the linoleum kitchen floor. In the hallway he saw large amounts of blood on the floor, as well as a broken chain. He then proceeded into the family room, then into a "formal room," then in the foyer where he observed blood on the front door and on the walls. From here he could again see the book bag and the broken stand. Chief Childs then went upstairs, observing that all the doors were closed same for the bathroom door, through which he could see a towel on the floor. He went into and quickly scanned all of the upstairs rooms before going back downstairs. Chief Childs went through what he

described as a formal dining room, through the kitchen, and out the door to the outside of the house where he radioed for further assistance.

At this time, Chief Childs followed the [appellee] as he and EMT Weigle walked to the ambulance which was at the end of the driveway. Chief Childs saw Detective Goodfellow arrive at the scene, and approached him. Chief Childs told Detective Goodfellow what his observations had been and that a crime scene had been established. Then Chief Childs and Detective Goodfellow approached the ambulance together. Chief Childs identified himself to the [appellee] and asked if the [appellee] could "help us with this incident." The [appellee] gave a brief statement before becoming visibly upset, and asked Chief Childs to call [his] mother. Specifically, Chief Childs testified concerning the [appellee's] statements as follows:

"At this point he told me he [the appellee] was upstairs sleeping. He heard the front door open, heard the front door close. He heard what appeared to be a struggle. And the whole time he's talking to me and relaying this, his

voice was elevating, lowering, quivering. And each time he would talk I would have to ask him to calm down and try to speak softly and more clearly so I could understand what he was saying.

He then said he heard what appeared to be a struggle. He came downstairs, observed blood on the floor of the hallway, went out into the kitchen and found his brother laying on the floor. I then asked him did he see anyone or hear anything. He said no, and all he kept saying at this point [was] that his brother was suffering, just suffering, just suffering and repeatedly saying that.

He started to become physically upset again where his voice was screaming. He asked to call his mother. He was worried about his dad. I reassured him that we would take care of contacting his parents, and then he looked at me and said, would you please call my mother.

I said I would call his mother. How do I get in touch with her? He then told me that her phone number is on the refrigerator door on a piece of paper.

While the record is unclear, it appears that the [appellee] left for the hospital in the ambulance at approximately 3:45 p.m. Chief Childs instructed Officer Boddington, who had arrived upon the scene, to follow the ambulance and secure the [appellee's] clothing. After speaking with the [appellee], Chief Childs and Detective Goodfellow re-entered the house where Chief Childs indicated to Detective Goodfellow what evidence he had seen on his initial protective sweep. Thereafter, Chief Childs requested the Pennsylvania State Police Crime Scene Investigation Unit to respond to the scene. He also obtained the [appellee's] mother's telephone number from the refrigerator, as the [appellee] had requested, and placed a call to her from a neighbor's home. Chief Childs also called the Airport Police Division of BWI Airport to attempt to locate the [appellee's] father when his flight arrived from Chicago.

It is unclear exactly when Mrs. Witman, the [appellee's] mother, arrived at the household from her work, however it appears to have been between fifteen minuted to an hour after the [appellee] was taken to the hospital. When Mrs. Witman arrived, Chief Childs approached

her at the end of the driveway. His testimony on direct examination concerning what happened next was as follows:

A. I walked up to her, put my arm around her. I again told her I was sorry for the loss of her son. I then started explaining to her what we were going to do as far as what we needed to do as far as processing the crime scene to obtain clues, evidence, to help us do our investigation.
Q. What did you say to her specifically?
A. I told her we were going to process the crime scene.
Q. Okay. And when you advised her of that, what did she respond?
A. Well, she wanted to go down and see her — she kept saying she wanted to see her baby. I told her that I couldn't allow her to do that because I wanted to maintain the integrity of the scene.
Q. What did she say when you told her you wanted to maintain the integrity of the crime scene for processing?
A. She told me I better do my job and find out who did this.
Q. Why didn't you get a search warrant at that point after you had these discussions

with the [appellee's] mother?
A. I felt that, you know, after me advising her what we were going to do to her residence, I just — you know, nothing was ever transpired saying no, we couldn't do this, or yes, we could do this. I just assumed that, you know, she knew what I wanted to do and what the detective team was going to do. I explained to her that we called in people that were specialized in processing crime scenes, photographs, and I just — we just did it."

Two members of the State Police crime scene unit arrived at approximately 4:30 and 5:30 respectively. The Chief County Detective from the Office of the District Attorney reported to the crime scene as well as the first assistant district attorney and a deputy district attorney. The state trooper from the crime scene investigation unit who arrived at 4:30 began to photograph the outside of the Witman residence, and the crime scene unit began to process the scene at 5:30 upon Trooper Woodcock's arrival. Preliminary processing of the scene had already begun by the time Chief Childs relayed Mrs. Witman's words, "you better do your job," to Detective Goodfellow. At that juncture in the

processing, photographs had been taken, and Trooper Woodcock had identified some specific areas of evidence of which he wanted samples or photographs taken. The preliminary processing of the crime scene prior to Mrs. Witman's arrival was largely exterior to the household and the open attached garage.

During the ambulance ride to the hospital, the [appellee's] sweatshirt and socks were removed by EMT Weigle at the [appellee's] request, and were placed inside a plastic bag. She also wiped the [appellee's] hands with a towel and placed that towel in a bag as well. An alcohol swab and a glove used by EMT Weigle were also placed in a bag. These items were eventually given to Officer Boddington at the hospital. Officer Boddington requested the EMT to turn over the items to him.

Detective Clancy of the District Attorney's Office arrived at the hospital between 5:15 and 5:30 p.m. Beginning at approximately 5:45, Detective Clancy spoke with the [appellee] for fifteen to twenty minutes. He introduced himself and told the [appellee] that he was safe. Detective Clancy

began the conversation by talking about soccer and sports. According to Detective Clancy, the [appellee] indicated that he "had been home sick from school and that he had stayed in his room, or he had been in bed all day and that he heard some noises and he thought it was his brother coming home from school. He had been asleep, and that he came down to check on the noise and he saw blood at the front door, and that he found his brother in the laundry room." Afterward, Detective Clancy spoke briefly with Mrs. Witman, who had arrived after the Detective began speaking with the [appellee]. Detective Clancy then spoke with the [appellee] again while his mother was present.

Mr. Witman arrived at the hospital at approximately 8:00 p.m. There he was met by Detective Clancy, and at some point thereafter Detective Clancy informed Mr. Witman what was occurring at his home concerning the processing of the crime scene:

> A. I advised him that the police were on the scene. I was of course sent to the York Hospital to talk with [appellee] to gather information, and there were people

at the scene, and it was going to be a long process because we needed to process the scene and gather up, you know, evidence, and that it would be a long process.

Q. And what was his response to those statements that you made?

A. He told me, "whatever it takes, do.".

. .

Mr. Witman acknowledged that his response to Officer Clancy was: "Go find Greg's killer." Mr. Witman specifically denied that Detective Clancy utilized the term "processing scene" and gather up evidence. The Court will accept Detective Clancy's version of the conversation, as well as Mr. Witman's directive. Both are consistent with one another and plausible based upon the factual background. We note the [appellee] represented in his brief in support of his pretrial motion that his father made the statement "whatever it takes, do!" as what was said at the hospital. We further note that subsequent to the first day, Mr. Witman remained in contact with Chief Childs directly asking the police to return to the household to conduct further investigations within the

house. Indeed one of the later search warrants for the household was initiated at Mr. Witman's request.

Detective Clancy returned to the crime scene between 8:30 and 9:00 and relayed Mr. Witman's remarks to the investigating officers. At approximately 12:30 the following morning, a chemical called Luminol (used to enhance the visibility of blood) was brought from the State Police Lab to the crime scene. Luminol was used to detect traces of blood and blood trails that were not visible with the naked eye. Upon application of the Luminol it is apparently the contention of the Commonwealth that various trails were discernable within and outside the household. The blood trails led to various locations throughout the house and yard including a "computer hutch" in the family room, and to a crop of trees next to a Jacuzzi in the back yard. A mound of dirt was discovered under the branches of one of the trees. Excavation of the mound uncovered a knife and what were eventually identified as athletic gloves. Up to this point in time, the evidence collected by the Commonwealth was seized without a warrant. Thereafter, a warrant was sought for

any additional seizures.

(Trial Court Opinion, Uhler, P.J., 5/7/99, at 2-10; citations to the suppression hearing transcript omitted).

-2 Upon review of the evidence, the court denied appellee's motion to suppress in part, admitting 50 items of evidence, and granted the motion in part, suppressing 22 items of evidence. In accordance with Pa.R.A.P. 311 **Interlocutory Appeals as Right (d) Commonwealth Appeals in Criminal Cases**, the Commonwealth certifies that suppression of 16 of these 22 items of evidence terminates or substantially handicaps its prosecution of appellee.[1] The Commonwealth presents the

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1 The Commonwealth challenges the suppression of the following items:
. blood sample from garage floor;
. blood sample from tile just inside garage door to house;
. table cloth from dining room table with blood on it;
. hair from molding on kitchen side of kitchen/laundry room;

following issues for our review:

> I. Did the trial court err in ordering the suppression of sixteen items of evidence when the Appellee lacked a legitimate expectation of privacy in his residence following his request for police assistance after the murder of his brother?

. welcome rug from foyer at front door;
. sample of unknown substance from back gate;
. trash from kitchen trash compactor;
. two knives from dishwasher in kitchen;
. clump of napkins from trash compactor bag;
. latent lift from inside front door (Item #33 in Motion to Suppress);
. latent lift from inside front door (Item #34 in Motion to Suppress);
. lift from inside of garage/laundry door;
. outside latch from screen door on rear screen porch;
. red "AP Long Lasting Mufflers" exacto type knife from appellee's bedroom;
. appellee's white socks taken from pink plastic bag obtained at the hospital; and
. appellee's pants and underwear.

> II. Did the trial court err in ordering the suppression of sixteen items of evidence when the Appellee, his mother, Mrs. Amelia Sue Witman, and his father, Mr. Ronald Witman, gave their consent to the search and seizure of all evidentiary items within their home?

(Appellant's Brief, at 4)

-3 We begin by addressing the Commonwealth's argument that in summoning police to his residence, appellee reduced his expectation of privacy therein. "[T]o prove a legitimate expectation of privacy in a structure, a defendant must establish that he has either a possessory interest or a legitimate presence, or he must establish some factor from which a reasonable and justified expectation of privacy can be deduced." ***Commonwealth v. Gordon***, 546 Pa. 65, 74, 683 A.2d 253, 257-258 (1996), citing ***Commonwealth v. Peterson***, 535 Pa. 492, 636 A.2d 615 (1993).

Implied Consent

-4 Under the facts of the present case, it is clear appellee had a legitimate expectation

of privacy in the house in which he lived at the time he placed the 911 phone call.[2] A review of the transcript of the 911 phone call reveals appellee sought to obtain medical assistance for his brother. Although broadcast as a medical matter, the emergent nature of the call made essential the prompt assistance of emergency personnel, be it medical, police or fire. Thereafter, appellee opened the garage door of the house to allow emergency personnel quick access to his brother. Appellee informed police that he had been upstairs in his bedroom, heard a thud as if something was being thrown against a wall and went downstairs. Appellee explained that upon

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2 A minor has the capacity to consent to the search of the family residence where the requirements for valid consent to search have been satisfied. See ***United States v. Broaden***, 116 F.3d 1486 (9th Cir. 1997), *cert. denied*, 522 U.S. 939, 118 S.Ct. 353, 139 L.Ed.2d 274 (1997); ***Lenz v. Winburn***, 51 F.3d 1540 (11th Cir. 1995) and ***United States v. Clutter***, 914 F.2d 775 (6th Cir. 1990), *cert. denied*, 499 U.S. 947, 111 S.Ct. 1413, 113 L.Ed.2d 466 (1991).

discovering his brother, he called 911.

~5 Having found no case in this Commonwealth sufficiently on point, we look to the case law of our sister states for discussion of this matter. Our review leads us to conclude that a sound exception to the warrant requirement must exist where a defendant has summoned police and set the tone for the initial investigation.

~6 In ***Brown v. Texas***, 856 S.W.2d 177 (Tex. Crim. App. 1993), the defendant called police and reported having discovered his wife dead in the garage. Upon arriving, police searched the detached garage and the home, based upon the information provided by appellant. The Texas Court of Criminal Appeals held:

> "when a crime is reported to the police by an individual who owns or controls the premises to which the police are summoned, and that individual either states or suggests that it was committed by a third person, he or she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the

identification of the perpetrator. As long as the individual is not a suspect in the case or does nothing to revoke his consent, the police may search the premises for these purposes, and evidence obtained thereby is admissible. This implied consent is valid only for the initial investigation conducted at the scene and does not carry over to future visits to the scene." (Id. at 182)

See also ***State v. Fleischman***, 754 P.2d 340 (Ariz. Ct. App. 1988)(by reporting to police that his wife had been killed in their restaurant, the defendant, who was not a suspect at the time, implicitly consented to the search of the restaurant and authorIzed the subsequent investigation); ***State v. Fredette***, 411 A.2d 65 (Me. 1979)(defendant consented to the search of her home where she called police, reported that her husband had been shot and, through her conduct, cooperated, approved and encouraged the police in their search); ***Kelly v. State***, 249 N. W .2d 800 (Wis. 1977)(defendant consented to search of premises where she reported to police that the deceased had been shot and that she had been in another room of the house at the time

of the shooting).

~7 Upon careful review of the facts of the present case, we find in summoning emergency personnel for help and by communicating to police the idea that a murderer was at large, appellee implicitly consented to the police entry into the house.

The Protective Sweep Doctrine

~8 The manner in which the victim sustained his fatal injuries made clear that a crime had been committed. Moreover, through his statement to police, appellee clearly communicated to police that there was a murderer at large, perhaps still in the house. Without knowing whether anyone remained in the house and based upon the information provided to them by appellee, police properly recognized the possibility that there may have been victims, perpetrators or witnesses remaining at the scene. Accordingly, police conducted a protective sweep of the premises for purposes of determining whether anyone remained inside the house.

~9 Under emergent circumstances, protective sweeps are a well-recognized exception to the warrant requirement. In ***Commonwealth v. Crouse***, 729 A.2d 588 (Pa. Super. 1999), *appeal denied*, 1999 Pa. LEXIS 3419 (Pa. November 9, 1999), this Court held that properly conducted protective sweeps violate neither the Fourth Amendment of the United States Constitution nor Article I, Section 8 of the Pennsylvania Constitution. ***Crouse*** involved police officers attempting to effectuate an arrest warrant at the defendant's home. Police, already lawfully inside the home heard a woman's scream from the second floor of the home and immediately proceeded to the second floor "to secure the residence for the safety of the officers." ***Id.*** at 590. Upon review of the definition of a "protective sweep" as set forth in ***Maryland v. Buie***, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), in conjunction with Pennsylvania case law discussing similar cursory searches, this Court held that protective sweeps are permissible pursuant to Article I, Section 8 of the Pennsylvania Constitution.

> The kind of sweep envisioned here is for persons. It cannot be used as a pretext

> for an evidentiary search. It cannot be lengthy or unduly disruptive. It must be swift and target only those areas where a person could reasonably be expected to hide. Above all, it must be supported by articulable facts and inferences giving rise to reasonable suspicion that the area to be swept harbors an individual posing a danger to the police.

Crouse, supra at 598.

~10 While the facts of this case do not involve execution of an arrest warrant as in ***Crouse***, they do create exigent circumstances at the greatest of levels. In ***Michigan v. Tyler***, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486, where the facts involved fireman responding to a furniture store fire, the United States Supreme Court, in an Opinion authored by Justice Stewart, held "it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze." ***Id.***, 436 U.S. at 509, 98 S.Ct. at 1950, 56 L.Ed. 2d at 498. "A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable'". ***Id.***

So too in the present case, where there was a reasonable and appropriate belief victims, perpetrators or witnesses remained inside, the exigency was sufficient to justify warrantless entry into the house. Based upon the information supplied by appellee, police had every reason to believe a third party had been and, more importantly due to the very short span of time between the murder and the police's arrival, perhaps, was still inside the house. Police had no reason to disbelieve appellee and, thus, we find the protective sweep to have been lawful and entirely appropriate. In conducting its protectIve sweep, it is well settled that all evidence observed in plain view is admissible. ***Id.*** Appellee's phone call to 911, in addition to his statement to police, upon their arrival, created a reasonable suspicion that victims, perpetrators or witnesses remained inside the house. The trial court fell into error when it treated appellee at the outset as a perpetrator rather than a victim for purposes of search and seizure when the police had every reason to believe otherwise. In his Opinion at page 15, the court states:

"In effect, the Commonwealth is asking

> the Court to ignore the time honored notion that a defendant is innocent until proven guilty. ...Therefore, the [appellee] has a reasonable expectation of privacy in his home which was not abandoned by his calling for emergency assistance."

(Slip Op. at 15-16.)

The 911 recording and transcript

~ 11 The suppression court found the contents of the 911 call to be irrelevant and, therefore, inadmissible. (See Trial Court Opinion, Uhler, P.J., 5/7/99, at 1-2, footnote 1.) The court explained that this evidence played no part in its consideration of the suppression issues. While this may be true, upon review of the record, we find no need for the exclusion of the 911 recording and transcript. This evidence forms the very foundation for the relationship appellee established with police. Appellee maintains no expectation of privacy with respect to his statements and, furthermore, careful review of the 911 tape fails to reveal unfair prejudice to the defense. To the contrary, the statements made by appellee when he called 911

appear to be wholly consistent with all of his subsequent statements to the police. It may also be necessary during trial, as a truth-determining process, to test prior consistent or inconsistent statements on behalf of either the appellee or the Commonwealth. It is the best evidence of what transpired in the opening minutes of this event and as such may be required as evidence of the occurrence pursuant to Pa.R.E. 1002, **Requirement of Original**. At worst, the 911 recording and transcript would be cumulative and corroborate evidence; however, this evidence, more than any other, demonstrates what transpired in the opening moments of police involvement initiated by appellee and goes to appellee's state of mind. In his Opinion, the trial court acknowledged that police involvement originated with the 911 call and the contents of that call relayed to police are inseparable from their conduct in reaching the house and their treatment of the appellee. Based upon the foregoing, we find erroneous the suppression court's exclusion of the 911 recording and transcript. While the Commonwealth did not object to the ruling by the trial court on this issue, our ruling may avoid the necessity of an appeal on

admissibility of the tapes or transcripts should the matter arise at trial.[3]

-12 Accordingly, based on appellee's call for help and consent to search the premises, all

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3 See ***Commonwealth v. Rodriguez***, 519 Pa. 415, 548 A.2d 1211 (1988)(Tapes and transcripts of tapes are admissible at trial). ***Commonwealth v. DeMarco***, 578 A.2d 942 (Pa. Super. 1990) (Answering machine tapes were improperly suppressed). ***Commonwealth v. Leveille***, 433 A.2d 50 (Pa. Super. 1981) (Sound recordings are admissible as evidence unless deficiencies render the recording as a whole untrustworthy). ***Commonwealth v. Groff***, 514 A.2d 1382 (Pa. Super. 1986), *appeal denied*, 515 Pa. 619, 531 A.2d 428 (1987) (In a case of first impression, this Court held that the admission of 911 tapes, which enhanced the screams of the wife/victim during her killing, was improper as inflammatory; the conviction was affirmed as the admission constituted harmless error in light of overwhelming evidence independent of the 911 tapes).

evidence observed in plain view during the initial protective sweep is admissible.

Duration of the permissible warrantless search

~13 The suppression court found that while the evidence observed in plain view during the protective sweep was admissible, subsequent searches conducted without a warrant failed to qualify under any exception to the warrant requirement. We disagree. While murder dues tend to turn cold quickly and, therefore, prompt investigation is essential, the idea of a "murder scene exception" was expressly rejected by the United States Supreme Court in, ***Mincey v. Arizona***, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Nevertheless, where police are conducting a valid search pursuant to a defendant's implied consent, the initial investigation in its entirety is permissible. As explained in ***Tyler, supra***, an investigation may require officials "to remain on the scene for an extended period of time repeatedly entering or re-entering the building. .." ***Id.***, 436 U.S. at 510 n.6, 98 S.Ct. at 1950 n.6, 56 L.Ed.2d at 499 n. 6.

~14 The record reveals that appellee

presented himself as a victim, apparently grieving the loss of his brother and traumatized by the heinous nature of the murder scene. There is no indication police suspected appellee. The record supports a finding that police were conducting an investigation pursuant to the valid consent of the resident, i.e. appellee. Accordingly, we find the period of time during which police canvassed the area and entered (and re-entered) the home for purposes of their initial investigation constitutes one continual and initial search.

Consent extending the warrantless search

~15 The Commonwealth argues appellee's parents individually consented to the search of their home. In an effort to invalidate their statements, the defense argues neither parent gave a valid consent. We focus our attention on the following arguments:

a. The words articulated by mother fail to communicate consent;
b. The totality of the circumstances surrounding mother's statement vitiate a finding of consent;

and
c. Father's statement, assuming it constitutes a valid consent to search, is not retroactive and does not validate previously conducted searches.

-16 In determining whether valid consent was obtained, we apply the following standard.

"Under both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, a search. ..which is conducted without a warrant, is deemed to be per se unreasonable. Certain specifically established exceptions, one of which is a valid consent may, however, render an otherwise illegal search, permissible. It is the state's burden to prove consent. This court, as the United States Supreme Court, has long adhered to the principle that for purposes of the Fourth Amendment, consent must have been given voluntarily."

Commonwealth v. Cleckley, 558 Pa. 517, 520, 738 A.2d 427, 429 (1999), citing ***Commonwealth v. Williams***, 547 Pa. 577, 692 A.2d 1031 (1997), ***Commonwealth v. Slaton***, 530 Pa. 207, 608 A.2d 5, 8-9 (1992), ***Bumper v. North***

Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), and ***Commonwealth v. Silo***, 480 Pa. 15, 389 A.2d 62 (1978).

~17 Moreover, "'voluntariness' is a question of fact to be determined from the totality of the circumstances and while knowledge of the right to refuse consent is a factor to consider in determining whether consent to search was voluntarily and knowingly given, it is not dispositive." ***Cleckley, supra*** at 522, 738 A.2d at 430, citing ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

~ 18 In this case, the mother arrived on the scene after appellee had been transported to the hospital. Understandably upset, mother expressed her desire to see her son (the victim). Police properly refused the mother's request, for the sake of preserving the integrity of the crime scene, as well as their concern for the mother's emotional and mental stability. The record reveals that mother was physically and emotionally distraught and stated to police, "You better do your job." Police testified that they understood this statement to be a consent to search. Moreover,

under the circumstances as they existed at the time mother made this statement, police had every reason to believe they were dealing with a grief-stricken brother, and now mother, receptive to police and with every reason to welcome investigation. Additionally, the officers testified that they described in detail what was required in conducting an investigation of this nature and the defense can not convert the mother's acknowledgment and consent to a mere expression without significance. This is disingenuous and borders on sophistry. It would be ludicrous to impose upon police the hindsight knowledge that appellee would later become their primary suspect, where there was no indication of his culpability at the time of mother's statement. Furthermore, mother was at the house when she made her statement. Without making light of the excruciating pain mother must have been experiencing, it is clear mother was aware police were at the house and what their purpose was in being there. Even under the most restricted of interpretations the only logical meaning of mothers statement is a directive to police to conduct their investigation. How else could the police "do their job" to find the killer if they were

prevented from investigating the crime scene by a thorough search for evidence. We must reject the courts finding that the mother failed to consent to the search that followed. Indeed, there is only a difference in semantics between her consent and that expressed by the father.

~ 19 With respect to father's statement, as found by the trial court, we find the evidence clearly established the conveyance or voluntary and informed consent to search. The record reveals that father was reasonably calm and aware of the circumstances. Police communicated to father their need to "process the crime scene" and father responded by stating, "Whatever it takes, do."

~ 20 Based upon the foregoing, we find that the initial valid and permissible warrantless search continued uninterrupted and that which was observed in plain view properly was seized. Furthermore, that evidence not in plain view also properly was seized In accordance with the consent of the appellee and his parents. Even had the consent of the mother not been valid, consent by the father to search the crime scene, which remained

secured, would have led inevitably to the discovery of those items determined by the suppression court to have been improperly seized pursuant to mother's consent. As a result, these items would be properly admitted at trial on the basis of the "inevitable discovery" doctrine. ***Commonwealth v. Melendez***, 544 Pa. 323,676 A.2d 226 (1996).

-21 Accordingly, mother's consent and father's consent is admissible at trial. Likewise, the 911 recording and transcript are admissible for use at trial. We agree with the court's suppression of the six items seized pursuant to search warrants but for which there was a lack of probable cause or an inadequate description in the affidavits to the search warrants.[4]

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[4] These items, numbered 17-22 on page 2 of the Order of May 7, 1999, follow:
.Shovel, approximately 3 feet in length, wooden handle;
.UHS tape with "Seinfeld Last Episode" written on it;
.White Lanyard with Sports FOBS attached:
.UHS-C tape adapter;

~ 22 Order reversed in part and affirmed in part; case remanded for trial.

~ 23 Jurisdiction relinquished.

Judgment Entered.

s/Prothonotary

Date: March 28, 2000

. Telephone records pertaining to dates other than October 2, 1998 unless further relevance can be established; and
."America Online" information pertaining to the [appellee's] parents.

APPENDIX C - Opinion of John C. Uhler, President Judge, Court of Common Pleas of York County, Pennsylvania, entered May 7, 1999.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA. :
:No. 5411 CA 1998
vs. :

ZACHARY WITMAN :

APPEARANCES:

H. Stanley Rebert, Esq.
District Attorney
Thomas H. Kelly, Esq.
Marilou V. Erb, Esq.
Assistant District Attorneys
For the Commonwealth

M. Christina Gutierrez, Esq.
Thomas L. Kearney, III, Esq.
For the Defendant

OPINION

The Court has before it the Defendant's

Motion to Suppress Evidence. Evidentiary hearings were conducted on February 18 and March 31,1999. The Court has also had the benefit of written briefs[5] submitted by both parties. The Defendant moves to suppress forty four items that were seized by the Commonwealth without a warrant, as well as twenty five items seized pursuant to seven separate search warrants. The Defendant also moves to suppress various statements given to

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5 The Commonwealth has incorporated in its Supplemental Memorandum, and the Defendant has moved to strike, a transcribed portion of the 911 emergency call placed by the Defendant on October 2, 1998. Because none of the police officers involved in responding to the emergency heard this call (their knowledge of the situation came from the dispatcher), the actual contents of the 911 tape were deemed irrelevant and therefore inadmissible for purposes of the suppression hearing. Accordingly, the excerpt reproduced by the Commonwealth in its brief played no part in the Court's consideration of the within issues. The officers testified as to the content of the dispatchers advices.

investigators on October 2, 1998.

The record before the Court is developed from the testimony offered at the two suppression hearings as well as the acknowledged and uncontested factual representations made by the parties contained in the pleadings. On October 2, 1998, thirteen year old Gregory Witman was killed in his home in New Freedom, Pennsylvania. Gregory's brother, the Defendant Zachary Witman, placed a 911 telephone call requesting emergency assistance at approximately 3:17 p.m. EMT, fire, and police personnel responded to the Witman home. EMT and fire personnel were the first to arrive at the scene. The Southern Regional Police Department arrived at approximately 3:25 p.m. Officer Sean Siggins was the first law enforcement officer on the scene. An EMT approached Officer Siggins and advised him that "he had a crime scene." Officer Siggins observed the Defendant standing in the garage with EMT Weigle. Officer Siggins observed that the Defendant was in an excited state, and was holding a telephone. N.T. 2/18/99 at 16. Blood was visible on the telephone as well as the defendant's hands and shirt. N.T. 2/18/99 at 23. Officer Siggins spoke briefly with the

Defendant, and testified regarding that conversation as follows:
"He [the defendant] at first just said he had to call his mom, he had to call his mom. I requested --I got some information from him, his name, why we were there. He said that he was home sleeping. He left a key in the door for his brother to get home. He heard a thud downstairs like something was getting thrown against the wall, came downstairs, found his brother, and called 911. N.T. 2/18/99 at 17."

After speaking with the Defendant, Officer Siggins walked to the doorway in the garage leading to the laundry room in the house and observed Gregory's body on the laundry room floor. N.T. 2/18/99 at 18.

Chief James Childs arrived at the scene at approximately 3:30 p.m. He met Officer Siggins on the driveway and instructed the officer to conduct a canvass of the neighborhood after he had composed himself. Chief Childs observed Gregory's body from the doorway into the laundry room, then returned to his car to get crime scene tape. He instructed the Deputy Fire Chief to assign a

fire fighter to mark a police area. The police area was marked with tape establishing the perimeters of the crime scene and sealing it off from unauthorized persons. A list was maintained upon the instruction of Chief Childs of all who entered the perimeters of the crime scene.

Chief Childs then approached the Defendant, who "was screeching in a high pitched voice" and indicating that he had to call his mother. N.T. 2/18/99 at 65. Chief Childs also observed blood on the front of the Defendant's sweatshirt. N.T. 2/18/99 at 73-74. Chief Childs then went to where EMT Neal was standing near the door and spoke to him concerning what the EMT had observed. EMT Neal indicated that he did not know if there was anyone else inside the house. N.T. 2/18/99 at 65. Chief Childs then conducted a "security sweep" of the premises to determine if anyone was inside. N.T. 2/18/99 at 65.

While conducting the "security sweep" Chief Childs indicated that he saw droplets of blood on the linoleum kitchen floor. In the hallway he saw large amounts of blood on the floor, as well as a broken table, a jacket, a

book bag, and a key ring neck chain. N.T. 2/18/99 at 66. He then proceeded into the family room, then into a "formal room," then into the foyer where he observed blood on the front door and on the walls. N.T. 2/18/99 at 67. From here he could again see the book bag and the broken stand. N.T. 2!18/99 at 67. Chief Childs then went upstairs, observing that all the doors were closed save for the bathroom door, through which he could see a towel on the floor. N.T. 2/18/99 at 67. He went into and quickly scanned all of the upstairs rooms before going back downstairs. N. T. 2/18/99 at 67-68. Chief Childs went through what he described as a formal dining room, through the kitchen, and out the door to the outside of the house where he radioed for further assistance. N.T. 2/18/99 at 68.

At this time, Chief Childs followed the Defendant as he and EMT Weigle walked to the ambulance which was at the end of the driveway. N.T. 2/18/99 at 69. Chief Childs saw Detective Goodfellow arrive at the scene, and approached him. Chief Childs told Detective Goodfellow what his observations had been and that a crime scene had been established. N.T. 2/18/99 at 70. Then Chief Childs and Detective

Goodfellow approached the ambulance together. N.T. 2/18/99 at 70. Chief Childs identified himself to the Defendant and asked if the Defendant could "help us with this incident." N.T. 2/18/99 at 70. The Defendant gave a brief statement before becoming visibly upset, and asked Chief Childs to call the Defendant's mother. N.T. 2/18/99 at 71-72. Specifically, Chief Childs testified concerning the Defendant's statements as follows:

"At this point he told me he [the defendant] was upstairs sleeping. He heard the front door open, heard the front door close. He heard what appeared to be a struggle. And the whole time he's taking to me and relaying this, his voice was elevating, lowering, quivering. And each time he would talk I would have to ask him to calm down and try to speak softly and more clear so I could understand what he was saying.

He then said he heard what appeared to be a struggle. He came downstairs, observed blood on the floor of the hallway, went out into the kitchen and found his brother laying on the floor. I then asked him did he see anyone or hear anything. He said no, and all he kept

saying at that point that his brother was suffering, just suffering, just suffering and repeatedly saying that.

He started to become physically upset again where his voice was screaming. He asked to call his mother. He was worried about his dad. I reassured him that we would take care of contacting his parents, and then he looked at me and said, would you please call my mother. I said I would call his mother. How do I get in touch with her? He then told me that her phone number is on the refrigerator door on a piece of paper. N.T. 2/18/99 at 71-72."

While the record is unclear, it appears that the Defendant left for the hospital in the ambulance at approximately 3 :45 p.m. Chief Childs instructed Officer Boddington, who had arrived upon the scene, to follow the ambulance and secure the Defendant's clothing. N.T. 2/18/99 at 74-75. After speaking with the Defendant, Chief Childs and Detective Goodfellow re-entered the house where Chief Childs indicated to Detective Goodfellow what evidence he had seen on his initial protective sweep. N.T. 3/31/99 at 145 et. seq. Thereafter, Chief Childs requested the

Pennsylvania State Police Crime Scene Investigation Unit to respond to the scene. N.T. 3/31/99 at 148. He also obtained the Defendant's mother's telephone number from the refrigerator, as the defendant had requested, and placed a call to her from a neighbor's home. N. T. 2/18/99 at 73. Chief Childs also called the Airport Police Division of BWI Airport to attempt to locate the Defendant's father when his flight arrived from Chicago. N. T. 2/18/99 at 76.

It is unclear exactly when Mrs. Witman, the Defendant's mother, arrived at the household from her work, however it appears to have been between fifteen minutes to an hour after the Defendant was taken to the hospital. When Mrs. Witman arrived. Chief Childs approached her at the end of the driveway. His testimony on direct examination concerning what happened next was as follows:

A. ...I walked up to her, put my arm around her. I again told her I was sorry for the loss of her son. I then started explaining to her what we were going to do as far as what we needed to do as far as processing the crime scene to obtain clues, evidence, to help us do

our investigation.
Q. What did you say to her specifically?
A. I told her we were going to process the crime scene.
Q. Okay. And when you advised her of that, what did she respond?
A. Well, she wanted to go down and see her --she kept saying she wanted to see her baby. I told her that I couldn't allow her to do that because I wanted to maintain the integrity of the scene.
Q. What did she say when you told her you wanted to maintain the integrity of the crime scene for processing?
A. She told me I better do my job and find out who did this. . . .
Q. Why didn't you get a search warrant at that point after you had these discussions with the Defendant's mother?
A. I felt that, you know, after me advising her what we were going to do to her residence, I just --you know, nothing was ever transpired saying no, we couldn't do this, or yes, we could do this. I just assumed that, you know, she knew what I wanted to do and what the detective team was going to do. I explained to her that we called in people that were specialized in processing crime scenes,

photographs, and I just — we just did it. N.T. 3/31/99 at 21-23.

Two members of the State Police crime scene unit arrived at approximately 4:30 and 5:30 respectively. The Chief County Detective from the Office of the District Attorney reported to the crime scene as well as the first assistant district attorney and a deputy district attorney. The state trooper from the crime scene investigation unit who arrived at 4:30 began to photograph the outside of the Witman residence, and the crime scene unit began to process the scene at 5:30 upon Trooper Woodcock's arrival. N. T. 3/31/99 at 150-52. Preliminary processing of the scene had already begun by the time Chief Childs relayed Mrs. Witman's words, "you better do your job," to Detective Goodfellow. N .T. 3/31/99 at 151. At that juncture in the processing, photographs had been taken, and Trooper Woodcock had N .T .3/31/99 at 152. The preliminary processing of the crime scene prior to Mrs. Witman' s arrival was largely exterior to the household and the open attached garage.

During the ambulance ride to the

hospital, the Defendant's sweatshirt and socks were removed by EMT Weigle at the Defendant's request, and were placed inside a plastic bag. N. T .3/31/99 at 72. She also wiped the Defendant's hands with a towel and placed that towel
I in a bag as well. N. T. 3/31/99 at 73. A~~ alcohol swab and a glove used by EMT Weigle
II were also placed in a bag. N.T. 3/31/99 at 73-74. Tllese items were eventually given to
II Officer Boddington at the hospital. N. T. 3/31/99 at 74. Officer Boddington requested the EMT to turn over the items to him.

Detective Clancy of the District Attorney's Office arrived at the hospital between 5:15 and 5:30 p.m. N.T. 3/31/99 at 85. Beginning at approximately 5:45, Detective Clancy spoke with the Defendant for fifteen to twenty minutes. N. T. 3/31/99 at 86-87. He introduced himself and told the Defendant that he was safe. Detective Clancy began the conversation by talking about soccer and sports. N. T .3/31/99 at 86. According to Detective Clancy, the Defendant indicated that he "had been home sick from school and that he had stayed in his room, or he had been in bed all day and that he heard some noises and he

thought it was his brother coming home from school. He had been asleep, and that he came down to check on the noise and he saw blood at the front door, and that he found his brother in the laundry room." N.T. 3/31/99 at 87. Afterward, Detective Clancy spoke briefly with Mrs. Witman, who had arrived after the Detective began speaking with the Defendant. N.T. 3/31/99 at 87-88. Detective Clancy then spoke with the Defendant again while his mother was present. N.T. 3/31/99 at 89-93.

Mr. Witman arrived at the hospital at approximately 8:00 p.m. N.T. 3/31/99 at 227. There he was met by Detective Clancy, and at some point thereafter Detective Clancy informed Mr. Witman what was occurring at his home concerning the processing of the crime scene:

A. I advised him that the police were on the scene. I was of course sent to the York Hospital to talk with Zachary to gather information, and there were people at the scene, and it was going to be, a long process because we needed to process the scene and gather up, you know, evidence, and that it would be a long process.

Q. And what was his response to those statements that you made?
A. He told me, "whatever it takes, do." ... N.T. 3131199 at 94-95.

Mr. Witman acknowledged that his response to Officer Clancy was: "Go find Greg's killer." N.T. 3/31/99 at 294. Mr. Witman specifically denied that Detective Clancy utilized the term "processing scene" and gather up evidence. The Court will accept Detective Clancy's version of the conversation, as well as Mr. Witman's directive. Both are consistent with one another and plausible based upon the factual background. We note the Defendant represented in his brief in support of his pretrial motion that his father made the statement "whatever it takes, do!" as what was said at the hospital. Memorandum in *Support of Motion to Suppress Evidence* at 7. We further note that subsequent to the first day, Mr. Witman remained in contact with Chief Childs directly asking the police to return to the household to conduct further investigations within the house. N .T. at 294. Indeed one of the later search warrants for the household was initiated at Mr. Witman's request. N. T. at

Detective Clancy returned to the crime scene between 8:30 and 9:00 and relayed Mr. Witman's remarks to the investigating officers. N.T. 3/31/99 at 96, 137-38. At approximately 12:30 the following morning, a chemical called Luminol (used to enhance the visibility of blood) was brought from the State Police Lab to the crime scene. N.T. 3/31/99 at 175. Luminol was used to detect traces of blood and blood trails that were not visible with the naked eye. Upon application of the Luminol it is apparently the contention of the Commonwealth that various trails were discernable within and outside the household. The blood trails lead to various locations throughout the house and yard including a "computer hutch" in the family room, and to a crop of trees next to a Jacuzzi in the back yard. N.T. 3/31/99 at 175-182. A mound of dirt was discovered under the branches of one of the trees. Excavation of the mound uncovered a knife and what were eventually identified as athletic gloves. N. T. 3/31/99 at 182-83. Up to this point in time, the evidence collected by the Commonwealth was seized without a warrant. Thereafter, a warrant was sought for

any additional seizures of evidence.

The Defendant moves to suppress the following items seized without a warrant: (1) Motorola portable phone from garage floor; (2) blood sample from garage floor; (3) blood sample from tile just inside garage door to house; (4) blood sample from wall in house inside garage door; (5) blood sample from tile floor inside kitchen; (6) blood sample from tile floor just before dining room; (7) blood sample inside garage/laundry door; (8) knife from dish drainer on counter beside kitchen sink; (9) blood sample from foyer; (10) table cloth from dining room table with blood on it; (11) blood sample from box in living room; (12) hair from molding on kitchen side of kitchen/laundry room door; (13) blood spot on dining room carpet; (14) blood sample from doorway from foyer/dining room; (15) blood sample front inside front door; (16) blood sample foyer floor; (17) Welcome rug from foyer at front door; (18) key from foyer floor; (19) backpack from foyer floor; (20) jacket from foyer floor; (21) silver basket from foyer floor; (22) silver dish from foyer floor; (23) rug from laundry room floor; (24) blood from inside door handle-back door in

laundry room; (25) hand towel from powder room; (26) hand towel from powder room; (27) hand towel from kitchen on step stool; (28) sample of unknown substance from back gate (w/ distilled water-air dried); (29) trash from kitchen trash compactor; (30) two knives from dishwasher in kitchen; (31) clump of napkins from trash compactor bag; (32) knife from wood block on counter; (33) latent lift from inside front door; (34) latent lift from inside front door; (35) lift from inside of garage/laundry door; (36) water from kitchen sink trap; (37) water from powder room sink trap; (38) outside latch from screen door on rear screen porch; (39) NAPA knife wrapped in pair of dark socks [gloves] w/blood on from buried under pine tree at rear of house; (40) soil sample from location where knife was buried; (41) Red "AP LOng Lasting Mufflers" exacto type knife from bedroom of Zachary Witman; (42) pink plastic bag with Defendant's white socks and sweatshirt enclosed; (43) a white towel used by Defendant to wipe his hands; (44) Defendant's pants and underwear.

The *Pennsylvania Rules of Criminal Procedure* provide that "[t]he Commonwealth shall have the burden of going forward with

the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights" where a motion to suppress has been filed. *Pa.R.Crim.P. 323(h).*

The Fourth Amendment to the United States Constitution and Article I of the Pennsylvania Constitution protect against unreasonable searches and seizures. U.S. CONST. AMEND. IV, PA. CONST. ART. I, §8. Whether a search is reasonable depends upon the expectation of privacy one has in the place to be searched or the things to be seized. To have a legitimate expectation of privacy, a person must show that they have exhibited a subjective expectation of privacy which society is prepared to recognize as reasonable and legitimate. *Commonwealth v. Gordon*, 546 Pa. 65, 683 A.2d 253 (1996). *Commonwealth v. Brundidge*, 533 Pa. 167,620 A.2d 1115 (1993).

Initially, the Court notes that it is clear, though challenged by the Commonwealth. that the Defendant has standing to challenge the constitutionality of the search at issue. The place searched was the Defendant's home, in which he unquestionably had a reasonable

expectation of privacy. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *New York v. Harris*, 495 U.S. 14,18, 109 L.Ed.2d 13,20,110 S.Ct. 1640,___(1990). The fact that the Defendant was not the owner of the home is immaterial. A person need not be the owner of a dwelling to exercise a challenge to the constitutionality of the search therein--even an overnight guest may exercise such a challenge. *United States v. Olsen*, 495 U.S. 91, 109 L.Ed.2d 85, 110 S.Ct. 1684 (1990) "An expectation of privacy is present when the individual by his conduct, 'exhibits an actual(subjective) expectation of privacy' and that[_] subjective expectation 'is one that society is prepared to recognize as reasonable.'" *Commonwealth v. Oglialoro*,525 Pa. 250, 256, 579 A.2d 1288, 1290 (1990). The determination of whether an individuals subjective expectation of privacy will be recognized as legitimate "depends upon the totality of the circumstances and ultimately rests upon a balancing of societal interests involved." *Commonwealth v. Peterson*, 408 Pa. Super. 22,27,596 A.2d 172, 174 (1991) (plurality opinion) *allocatur granted*, 530 Pa. 641,606 A.2d 252 (1992) *affirmed* 636 A.2d 615

(1993).

Generally, residential settings are the areas which are given the greatest protection by the Fourth Amendment. The United States Supreme Court has held:

"The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individuals home--a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their ...houses. ..shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 US 505, 511, 5 L.Ed 2d 734, 81 S.Ct., 679[683], 97 ALR 2d 1277. In plain terms, this principle applies equally to seizures of property and to seizures of persons, wherein the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be

reasonably crossed without a warrant. *Payton v. New York*, 445 US 573, 589-590,100 S.Ct. 1371, 1381-1382,63 L.Ed.2d 639,653 (1980).

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. 385, 390, 57 L.Ed.2d 290,298-99,98 S.Ct. 2408,___(1978) (citing *Katz v. United States*, 389 U.S. 347,357, 19 L.Ed.2d 576,88 S.Ct. 507). Accordingly all searches and seizures initiated in a household without a warrant are per se unreasonable unless the search falls within an exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443,91 S.Ct. 202,29 L.Ed.2d 564 (1971).

The specific exceptions to the warrant requirement include searches and seizures made pursuant to "exigent circumstances" and the "plain view" doctrine. *Mincey*, 437 U.S. at 392-93. Consent given by a party may also

excuse the warrant requirement. *Commonwealth v. Dunne*, 456 Pa.Super. 523,456 A.2d 1233, (Pa.Super. 1997). As noted it the burden of the Commonwealth to establish that the challenged evidence was not seized or acquired in violation of the defendants rights.

When considering the exigent circumstances exception to the warrant requirement it is recognized:

"Terms like ..exigent circumstances" or "urgent need" are useful in underscoring the heavy burden on the police to show that here was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourth Amendment as "unreasonable." *Dorman v. United States*, 435 F.2d 385, 392 (1970)."

The Superior Court of the Commonwealth of Pennsylvania has said:

"All decisions made pursuant to the exigent circumstances exception [to the warrant requirement] must be made cautiously, for it

is an exception which by its nature can very easily swallow the rule unless applied in restricted circumstances. *Commonwealth v. Daniels*, 280 Pa Super 278,286, 421 A.2d 721,725 (1980)."

Police unquestionably may and are duty bound to respond to emergency situations. This Court takes judicial notice that the fundamental role of police is to maintain public safety which includes response to emergency calls such as the within. The Supreme Court of the United States, however, has earlier established that a Defendant does not lose his expectation of privacy under the Fourth Amendment by calling for emergency assistance. It has been held that a person's "call for help can hardly be seen as an invitation to the general public that would have converted {one's} home into the sort of public place for which no warrant would be necessary." *Thompson v. Louisiana*, 469 U.S. 17, 22, 83 L.Ed.2d 246,251-52,105 S.Ct. 981, ___(1984).

The Commonwealth argues that the Defendant has relinquished his expectation of privacy by summoning the police to his

residence to investigate a crime while deceiving the police into believing that another person committed the crime. This argument has not been accepted by the precedential case authority. In effect, the Commonwealth is asking the Court to ignore the time honored notion that a defendant is innocent until proven guilty. The reasoning of the Commonwealth would impermissibly convict the Defendant even before the evidence against him was gathered. See *Mincey v. Arizona*, 437 U.S. 385,391,57 L.Ed.2d 290,299,98 S.Ct. 2408, ___(1978). Therefore, the Defendant has a reasonable expectation of privacy in his home which was not abandoned by his calling for emergency assistance.

The Court next turns to the issue of whether certain items of evidence seized without a warrant are admissible through any of the exceptions to the warrant requirement. A person's "call for help can hardly be seen as an invitation to the general public that would have converted [one's] home into the sort of public place for which no warrant would be necessary." *Thompson v. Louisiana*, 469 U.S. 17,22,83 L.Ed.2d 246, 251-52, 105 S.Ct.981, ___(1984). The call for help, however, may

trigger what is perceived to be an exigent circumstance --the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within a household is in need of immediate aid. *Mincey*, 437 U.S. at 392. Likewise, when police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises under the emergency exception. The police may seize any evidence that is in plain view during the course of such emergency activities. *Id.* at 393. For evidence to be admissible under the plain view doctrine, the initial intrusion must be lawful; the item must have been inadvertently observed; and there must be probable cause to link the observed property with criminal activity. *Commonwealth v. Davidson*, 389 Pa. Super. 166,566 A.2d 897 (1989).

Such a warrantless search must however be "strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. at 393 (citing *Terry v. Ohio*, 392 U.S. 1.25-26,20 L.Ed.2d 889,88 S.Ct. 1868) *Commonwealth v. Williams*, 483 Pa. 293,396 A.2d

1177(1978). The seriousness of the offense under investigation itself does not create the kind of exigent circumstances that under the Fourth Amendment justify a warrantless search. *Id.* at 394. There is also no "murder scene" exception which permits an extensive general search without a warrant. *Id.*

In the present case, the police were called to the scene by the 911 dispatcher who had received a request for emergency assistance from the Defendant. Their intrusion onto the premises was therefore lawful. Officer Siggins observed the Defendant standing in the garage with blood on his sweatshirt, hands, and the telephone he was holding. Chief Childs also saw blood on the Defendant's sweatshirt. In as much as the officers had arrived on the scene simply to ascertain the situation, their observation of the Defendant was inadvertent. The presence of blood on the Defendant's person potentially establishes a link between his clothing and the telephone to the criminal activity. Likewise, Chief Childs was duty bound to conduct a "security sweep" to determine if there were any other victims, witnesses, or intruders remaining in the household. Whatever

evidence Chief Childs viewed in plain view during this search was therefore seizable. *Mincey*, 437 U.S. at 393. The Court will undertake an item by item determination of admissibility below.

The Court must next consider whether any of the Witmans gave consent to the police to search the residence. The Commonwealth argues that the Defendant, as well as Mr. and Mrs. Witman, made statements which amounted to consent for the police to search the home. If a person voluntarily consents to a search, evidence found as a result of that search is admissible. *Commonwealth v. Roland*, 701 A.2d 1360 (Pa.Super. 1997). The consent, however, must be given freely, specifically, unequivocally and voluntarily. *Id*

The law concerning the validity of consent differs between federal and Pennsylvania law. See *Commonwealth v. Hoak*, 700 A.2d 1263, 1278 (Pa.Super. 1997) (Johnson, J.,dissenting). Under an analysis of the Fourth Amendment to the United States Constitution, consent to a search is valid if it is voluntary as determined from all of the circumstances. *Schneckloth v. Bustamore*, 412

U.S. 218,36 L.Ed.2d 854,93 S.Ct. 2041 (1973). While the subject's knowledge of a right is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establish a voluntary consent. *Id.* However, Pennsylvania employs a stricter standard under Article I,§8 of the Pennsylvania Constitution. When interpreting their own state constitutions, states are not bound by decisions of the United States Supreme Court which interpret similar, yet distinct, federal constitutional provisions, so long as they remain faithful to the minimum guarantees established by the United States Constitution. *Commonwealth v. Edmunds*, 526 Pa. 374,586 A.2d 887 (Pa. 1991). In interpreting Article I,§8, the Pennsylvania Supreme Court has repeatedly said that the provision is meant to safeguard a strong notion of privacy, whereas its federal counterpart has been interpreted merely to deter police misconduct. *Commonwealth v. Matos*, 672 A.2d 769,772-73 (Pa. 1996), *Edmunds*, 586 A.2d at 897-98.

Under Pennsylvania law, the **subject of the search** must be informed of his or her right to refuse the search and insist that the

Commonwealth obtain a search warrant. *Commonwealth v. Gibson*, 536 Pa. 123,638 A.2d 203 (Pa. 1994); *United States v. Blalock*, 1255 F .Supp. 268 (E.D.Pa. 1966). Pennsylvania follows a totality of the circumstances test to verify voluntariness, *Commonwealth v. Dunne*, 456 Pa.Super. 523, 690 A.2d 1233 (Pa. Super. 1997), but also requires a separate test to determine whether consent is knowing and intelligent. *Gibson*, 638 A.2d at 207, *Blalock*, 255 F.Supp. at 269-70. "It is only where there is an intentional relinquishment of a known right or privilege that an effective waiver can be found... the **subject of a search** must be made aware of his rights against a warrantless search for a waiver to be intelligent." *Gibson*, 638 A.2d at 207. "Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right.'" *Blalock*, 255 F.Supp. at 269. It has been said that this requirement applies equally to Defendants as well as third parties giving consent. *Scott v. Pennsylvania Board of Probation*, 668 A.2d 590 (Pa. Cmwlth. 1995). In *Scott, Id* the parole agent gained entrance to

the parolee's approved residence by using a key recovered from the parolee when he was arrested. Once the parole agent was inside the kitchen they encountered the parolee's mother. The agent advised the mother that they were going to search her son's bedroom and asked her to direct him to the room. When the mother hesitated to disclose the information, the agent told her that he and the other agents would go upstairs and locate and search the room themselves. The mother acquiesced and directed the agent to her son's bedroom; however after she had gone back to the kitchen the agent located the weapons **in another room** adjacent to her son's bedroom. The Commonwealth Court under those circumstances concluded that the mother did not voluntarily, intelligently, and unequivocally consent to the search conducted by the parole agent. Because there was no consent to search the adjacent room, the issue of whether a third party must be made aware of their right to refuse consent was not before the court.

On their face, both *Gibson* and *Blalock* appear to rest on traditional Fourth Amendment analysis rather than a reading of Article I,

§8 of the Pennsylvania Constitution.[6] However, there exists clear precedent in Pennsylvania defining the appropriate standard to be used when considering whether an individual has consented to a search. Such a long standing definition of what constitutes consent as applied by the courts of this Commonwealth cannot be ignored, particularly when viewed in tandem with the Pennsylvania Supreme Court's recognition of the privacy rights embodied in Article I, §8. See *Commonwealth v. Matos*, 672 A.2d 769, 774 (Pa. 1996). Just because a case was decided to some degree by reliance upon the federal Fourth Amendment, that does not mean that it is not representative of the law of the Commonwealth pertaining to Article I,§8. *Matos*, 672 A.2d at 774, fn. 7, "At best, nothing can be discerned from the Court's failure to note specifically that Pennsylvania

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[6] See. e.g. "First, we hold that the present situation should be analyzed using the traditional Fourth Amendment search jurisdiction." *Gibson*, 638 A.2d at 205; "The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth." *Blalock*, 255 F .Supp. at 269.

Constitutional rights were also being considered." *Id.* The federal constitution provides a minimum level of rights below which the states may not go; so if the Court finds that a defendants federal constitutional rights were violated, then there is no reason or the Court to address what additional protection the Pennsylvania Constitution might also provide. *Id.* Therefore, if the Pennsylvania Supreme Court has set forth a clear standard which nonetheless appears to conflict with the federal rule, Pennsylvania courts must presume that the standard is attributable to the greater protection afforded by the Pennsylvania Constitution.

In the present case, the Court must undertake a consent analysis under both the United States and Pennsylvania Constitutions, because an inquiry into each could yield different outcomes. Clearly the Commonwealth can not rely upon the 911 call by Zachary Witman as a consent. The police were not directly privy to the statements made by the defendant to 911. Thus the entreaties by Zachary Witman for assistance to 911 could not directly have been relied upon by the police investigators as a consent to search the

household. As explained above, placing an emergency call to the 911 dispatcher does not amount to consent for a general search of a residence. Nor did the Defendant's statements to Officer Siggins or Chief Childs (describing what he heard and saw inside the house) in any way convey "unequivocal, specific, and involuntary" consent. *Roland*, 701 A.2d 1360. Therefore, no consent was given by the Defendant under Article I, §8 analysis.

Likewise, Mrs. Witman's statement, "You better do your job," in response to Chief Child's statement concerning the processing of the crime scene is not unequivocal. Her statement appears to be closer to an acquiescence to a claim of lawful authority in light of the conversation described by Chief Childs. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Commonwealth v. Bagley*, 408 Pa. Super. 188, 596 A.2d 811 (Pa. Super. 1991). Here, it appears that the preliminary processing of the scene had already begun;

Chief Childs did not ask for permission, but rather explained what was going to happen regarding further crime scene processing; and Mrs. Witman was told she should leave the scene to go to the hospital with her other son. Her response, "do your job," more closely resembles an acquiescence to a claim of lawful authority rather than unambiguous consent. The statement of Mrs. Witman does not amount to consent under either standard.

As explained below, Mr. Witman's statement, "whatever it takes, do!," and "go find Greg's killer" would qualify as consent under the standards of the Fourth Amendment, but might fail under an analysis of Article I, §8 because he was not informed of his right to refuse consent. But when considering the totality of the circumstances and balancing of societal interests involved, see Peterson, supra, we believe the precedential authority is to the contrary with third persons and that the Fourth Amendment standards are applicable.

Mr. Witman's consent was unequivocally and voluntarily given under the standards of the Fourth Amendment. When looking at the totality of the circumstances to determine if

consent was voluntarily given, the Court must examine the following factors: the setting in which the consent was obtained; what was said and done by the parties present; and the age, intelligence, and educational background of the person consenting." *Commonwealth v. Dunne*, 456 Pa. Super. 523, 690 A.2d 1233 (Pa. Super. 1997). Detective Clancy and Mr. Witman spoke in the hospital. There was nothing coercive in this setting. When Detective Clancy explained what was happening concerning the processing of the Witman home, Mr. Witman replied, "whatever it takes, do," and/or "go find Greg's killer." While Mr. Witman was not specifically asked for consent, his response was nonetheless unequivocal. Imploring the police to do "whatever it takes" encompasses a thorough investigation of the crime scene, particularly when such a statement comes in response to an explanation of what crime scene processing entailed. Finally, Mr. Witman's age, intelligence, and educational background certainly evidence his ability to give a knowing and voluntary consent. Mr. Witman's statement evidences consent under the Fourth Amendment standard, and accordingly, any evidence seized after his words were relayed to the officers at the crime scene would not

have required a warrant.

However, under an analysis of Article I, §8 of the Pennsylvania Constitution it is argued that consent was not knowingly granted by Mr. Witman or any other member of his family. Under Pennsylvania law, the police were required to inform the subject of the search that they had a right to refuse consent. *Commonwealth v. Gibson*, 536 Pa. 123, 638 A.2d 203 (Pa. 1994) (citing *United States v. Blalock*, 255 F.Supp. 268 (E.D.Pa. 1966)). This clearly was not done by the police officers nor the District Attorney representatives. None of the Witman's were told that they could refuse consent and thereby insist that the police obtain a search warrant.

The Supreme Court of Pennsylvania expanded upon its analysis in *Gibson, id.* as follows:

> "In the present case, the police arrived at the apartment and confronted the owner in the doorway. They did not announce to him that they intended to search the apartment for evidence of underage

drinking. The owner did not give his express consent that the police could enter. Nor did he refuse to let the police in. Instead, he testified that the police chief maneuvered him into the foyer of the apartment, and fellow officers followed him into the apartment. Mr. Fifoot [the owner] testified: "Id did not given permission. I was not asked. I didn't say you cannot come in, or stop; but I didn't say yes, come on in." (R.R. at 37a-38a).

We find that Mr. Fifoot [the owner], under these circumstances, did not provide an "unequivocal specific, and voluntary consent." Mr. Fifoot never gave his express consent for the police to enter. The police basically spoke briefly to the owner and entered the apartment without announcing why they were present. Had the police announced their purpose, we cold then infer consent had the owner failed to refuse access. However, here, to stop the police, the owner would have had to order them out of his apartment without knowing why they were present. The law of consent in this

> Commonwealth does not require this on the part of a residence owner."

Had that been done the Supreme Court advised "we could then infer consent." It does not appear from the Supreme Court's analysis that the owner of the premises who is not the **subject of the search** be made aware of his rights against a warrantless search for a waiver to be intelligent. The essential attribute appears to be that the police announce their purpose and that the owner provides his or her "unequivocal, specific and voluntary consent." This was done in Mr. Witman's case. Consequently, the Commonwealth may rely on the consent of Mr. Witman as a justification for the warrantless search, but any evidence not seized as a result of plain view prior to Mr. Witman's consent must be suppressed. *Gibson*, 638 A.2d at 206-07 ("The remedy for an illegal search is an exclusion of all evidence derived from the illegal search.") (citing *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961)). Unfortunately the record before this court fails to clearly identify the timing of when some of the items were located.

With this factual backdrop we will now look to the list of items that the Defendant has moved to suppress. As stated above, those items seized in plain view and observed during the security sweep will be admitted, and those that were seized outside of the scope of plain view and before the consent must be suppressed. The burden rests on the Commonwealth to show that the items seized meet the plain view exception, *Parkhurst v. Trapp*, 77 F.3d 707 (3rd Circ. 1996), or were attributable to the consent. Again, for evidence to be admissible under the plain view doctrine, the initial intrusion must be lawful; the item must have been inadvertently observed; and there must be probably cause to link the observed property with criminal activity. *Commonwealth v. Davidson*, 389 Pa. Super. 166, 566 A.2d 897 (1989). The Court notes that the crucial element for most of the following items is what Chief Childs saw during his security sweep. However, as noted above, Chief Childs described to Detective Goodfellow what was seen during this entry. Therefore, the Court will accept Detective Goodfellow's testimony concerning what was shown to him by Chief Childs as the two of them went through the house. The Court finds

as follows:

(1) Motorola portable phone from garage floor: this item was seen in plain view by both Officer Siggins and Chief Childs upon arrival at the Witman home. The presence of blood on the telephone was sufficient to give officers probable cause that the telephone was connected to the crime scene. This item is admissible. (2) Blood sample from garage floor: Detective Goodfellow testified that he "[didn't] know if at that time Chief Childs had pointed that out on our initial entry or I observed that when we went in the second time as a team." N.T. 3/31/99 at 153. Given the inconclusiveness of this statement, the court cannot find that this blood sample was found in plain view. The blood sample from the garage door must therefore be suppressed. (3) Blood sample from tile just inside garage door to house: Detective Goodfellow testified: "I don't think I noticed that on our initial entry into the house." N.T. 3/31/99 at 153. It appears from the testimony that this particular blood sample was not seen in plain view during the security sweep and cannot be admitted. (4) Blood sample from wall in house inside garage door: While Detective

Goodfellow expressed hesitancy about this particular sample, he did not indicate that blood was clearly visible on the wall in several places during the initial entry. N.T. 3/31/99 at 154. The presence of blood at a homicide scene undoubtedly gives the police probable cuase to link the blood with the criminal activity. The Court is satisfied that this sample was in plain view and is admissible. (5) Blood sample from tile floor inside kitchen: Both Chief Childs and Detective Goodfellow testified that blood was visible on the kitchen floow. N.T. 2/18/99 at 66, N.T. 3/31/99 at 154, 157. This sample was in plain view and is admissible. (6) Blood sample from the tile floor just before dining room: Detective Goodfellow testified that this sample was also seen in plain view during the initial entry. N.T. 3/31/99 at 157-58. As such, it is admissible. (7) Blood sample inside garage/laundry door: This item was also in plain view according to Detective Goodfellow's testimony. N.T. 3/31/99 at 158. It is admissible. (8) Knife from dish drainer on counter beside kitchen sink: This knife was in plain view on the counter in the kitchen. The fact that the victim was stabbed gave the police probable cause to link knives

in the vicinity to having a possible connection with the crime. This knife is admissible. (9) Blood sample from foyer: This sample was in plain view during the security sweep. N.T. 3/31/99 at 160. It is admissible. (10) Table cloth from dining room table with blood on it: Detective Goodfellow testified that "I didn't observe that at the time." N.T. 3/31/99 at 160. The table cloth cannot be admitted because it was not seen during the initial entry. (11) Blood sample from box in living room: Detective Goodfellow testified that this sample was seen during the initial entry. N.T. 3/31/99 at 162. It is therefore admissible. (12) Hair from molding on kitchen side of kitchen/laundry room door: Detective Goodfellow said he "noticed blood on the door jamb on the initial walk through, not the hair." N.T. 3/31/99 at 162-63. Because the hair itself was not seen during the initial entry, it cannot be admitted. (13) Blood spot on dining room carpet: Detective Goodfellow testified that this was in plain view as well. N.T. 3/31/99 at 164. It will be admitted. (14) Blood sample from doorway from foyer/dining room: This was seen during the initial pass through, N.T. 3/31/99 at 164, and will thus be admitted. (15) Blood sample

from inside front door: Detective Goodfellow testified that he observed this blood during the first pass through. N.T. 3/31/99 at 165. This sample is admissible. (16) Blood sample foyer floor: This sample was also seen initially, N.T. 3/31/99 at 165, and is therefore admissible. (17) Welcome rug from foyer at front door: There was no indication from the testimony what gave the police probable cause to secure this item. Detective Goodfellow did not indicate that blood was found on the rug, nor did he indicate any other reason for the police to suspect that the Welcome rug was connected to criminal activity. N.T. 3/31/99 at 165. The Commonwealth has not established their burden that the rug is admissible under the law of plain view. Therefore, this item must be suppressed. (18) Key form foyer floor: Detective Goodfellow testified that this was seen during the initial entry. N.T. 3/31/99 at 166. Given that the police saw no obvious signs of forced entry, a key has obvious impliction concerning mode of entry, and gives the police adequate probable cause to seize the item. It is admissible. (19) Backpack from foyer floor, and (20) jacket from foyer floor: Both these items were seen during the

initial entry. N.T. 2/18/99 at 66, N.T. 3/31/99 at 166. Given that these are items that could have been worn by the victim, and their presence in the crime scene area, the police had probable cause to connect these items to the criminal activity. Both the jacket and the bookbag are admissible. (21) Silver basket from foyer floor, and (22) silver dish from foyer floor: Detective Goodfellow testified that both of these items were seen during the initial sweep. N.T. 3/31/99 at 166. Given that such items are not normally located on the floor, the police had probable cause to believe they could have been knocked there during a struggle. The basket and dish are both admissible. (23) Rug from laundry room floor: This item was seen in plain view in close proximity to the victim. N.T. 3/31/99 at 167. The appearance of the rug indicated that the victim could have been wrapped in it, or that the victim could have pulled the rug into the room with him. N.T. 3/31/99 at 167. Therefore, the police had probable cause to link the rug with the criminal activity. The rug from the laundry room floor is admissible. (24) Blood from inside door handle-back door in laundry room: This blood sample was seen during the initial

entry. N.T. 3/31/99 at 167. It is therefore admissible. (25) hand towel from powder room, (26) hand towel from powder room, and (27) hand towel from kitchen on step stool: These towels were found in areas in close proximity to blood samples. N.T. 3/31/99 at 168-69. In as much as such towels could be relevant if the perpetrator had attempted to clean himself or evidence, the police had probable cause to link the towels with the criminal activity. All three towels are admissible. (28) Sample of unknown substance from back gate (w/distilled water air dried): This sample was taken from a gate outside the house, and were therefore outside the scope of the interior security sweep of the household. Therefore, this evidence must be suppressed. (29) Trash from kitchen trash compactor: There was no testimony that this was in plain view during the initial entry. Therefore, the Commonwealth has failed to sustain its burden and this evidence must be suppressed. (30) Two knives from dishwasher in kitchen: Detective Goodfellow testified that the police needed to look inside the dishwasher in order to observe these knives. N.T. 3/31/99 at 170. As such, it does not appear that these knives could have been in plain view during the initial

sweep of the house. Accordingly, the knives from the dishwasher must be suppressed. (31) Clump of napkins from trash compactor bag: Detective Goodfellow indicated that this was not seen during the initial pass through. N.T. 3/31/99 at 170. Any item found that requires looking through a bag of trash cannot be plainly visible nor found inadvertently. This item therefore cannot be admitted. (32)Knife from wood block on counter: Detective Goodfellow testified that this item was visible in the vicinity of blood droplets. N.T. 3/31/99 at 171. Again, given that the victim was stabbed, knives in plain view at the crime scene give the police probable cause to link them to criminal activity. This knife will be admitted. (33) Latent lift from inside front door, (34) latent lift from inside front door, and (35) lift from inside of garage/laundry door: By definition, latent fingerprint lifts are not readily visible without visual enhancement. As such, these prints were not in plain view. There was no clear testimony concerning when these lifts were taken, therefore the Commonwealth has not established that they were taken after Mr. Witman gave his consent. Consequently, these latent lifts must be suppressed. (36) Water

from kitchen sink trap, and (37) water from powder room sink trap: Detective Goodfellow testified that this water was not in plain view, N.T. 3/31/99 at 173, and its link to the criminal activity was made apparent only with the use of Luminol. N.T. 3/31/99 at 177. The use of Luminol di dnot begin until 12:30 a.m. of October 3, 1998. Therefore, this evidence was seized after Mr. Witman had given consent and is therefore admissible. (38) Outside latch from screen door on rear screen porch: There was no testimony by the Commonwealth that this latch was in plain view during the initial entry, nor does it appear that it could have been given that it is on the exterior of the house. There was also no testimony that indicated that latch was seized after Mr. Witman consented. As such, this item cannot be admitted. (39) NAPA knife wrapped in pair of dark socks [gloves] w/blood on from buried under pine tree at rear of house: the testimony at the hearing established that the knive and gloves in question were discovered by following a blood trail that was visible only through the use of Luminol. N.T. 3/31/99 at 179-83. Neither the knife, nor the blood trail that led the police to the backyard, were in plain view. However,

the use of Luminol began well after Mr. Witman had given consent. Therefore, the knife and gloves are admissible. (40) Soil sample from location where knife was buried: For the same reasons as just discussed, the soil sample is samissible. (41) Red "AP Long Lasting Mufflers" exacto type knife from bedroom of Zachary Witman: The Commonwealth provided no testimony indicating that this knife was in plain view during Chief Childs initial entry, nor that it was seized after Mr. Witman had given his consent. As a consequence, the Commonwealth cannot sustain its burden of showing that the knife was legally seized. It must therefore be suppressed. (42) Pink plastic bag with Defendant's white socks and sweatshirt enclosed: Both Officer Siggins and Chief Childs testified that they observed blood coving the Defendant's sweatshirt when they arrived on the scene. However, neither indicated that they observed on the Defendant's socks. N.T. 2/18/99 at 23, 73-74. According, the sweatshirt is admissible, but the socks may not be admitted. (43) A white towel used by Defendant to wipe his hands: The testimony of EMT Weigle indicated that the towel did not belong to the Defendant and was not something he had brought with him. N.T.

3/31/99 at 73. Because the towel was not his, nor something he had in his possession, the Defendant did not have any reasonable expectation of privacy in this towel. As such, it is admissible (44) Defendant's pants and underwear: The police officers did not indicate that there was any blood visible on the Defendant's pants. As such, there was o probable cause to link the pants with the crime scene even though they would have been plainly visible to the police. Certainly the Defendant's underwear were not in plain view. Therefore, the pants and underwear must be suppressed.

Next the Defendant moves to suppress certain items seized pursuant to search warrants. A search warrant must name or describe with particularity the property to be seized and the place to be searched, and the search may not go beyond the scope of the warrant. Commonwealth v. Bagley, 408 Pa. Super. 188, 596 A.2d 811 (Pa. Super. 1991). The Superior Court stated:

In any assessment of the validity of the description contained in a warrant, a court must initially determine for what items

probable cause existed. The sufficiency of the description must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between items for which there was probable cause and the description in the warrant requires suppression. An unreasonable discrepancy reveals that the description was not a specific as was reasonably possible. Bagley, 596 A.2d at 815 (citing Commonwealth v. Grossman, 521 Pa. 290, 296-97, 555 A.2d 896, 899-900 (Pa. 1989)).

Therefore, the Court must first determine whether probable cause existed to seize the items listed, and whether the items that were actually seized were described with sufficient particularity. To determine if probable cause exists, the Court must make a common-sense decision whether, under all the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular. Commonwealth v. Jones, 542 Pa. 418, 668 A.2d 114 (Pa. 1995).

Warrant number L23619 provided for the seizure of "electronic data processing and storage devices, computers, and computer

systems including central processing units; internal and peripheral storage devices such as fixed disks, external hard disks, floppy disk drives and diskettes, tapes, optical storage device or other." The grounds for probable cause were listed as follows:

> On October 2, 1998 at 3:19 p.m. your affiant and other investigative team members responded to 9 Albright Court, New Freedom Borough, Pennsylvania to a report of a homicide that had occurred at the residence. Located in the residence was the body of Gregory Witman, white male, thirteen (13) years of age. Investigation revealed that Gregory Witman was the victim of a homicide that had occurred between three (3:00) p.m. and three nineteen (3:19) p.m. Through the use of Luminol, blood trails were traced to a southeast corner of the residence, where located was a personal computer. Information obtained through interviews establishes that someone connected to the residence accessed an Internet account during the time of the homicide. Your affiant believes that some pertinent date or information

relating to the homicide investigation may be located in or on the above described computer devices.

Warrant number 123621 provided for the seizure of "phones and all related equipment, including answering machines, gloves, papers, records, correspondence and notes pertaining or relating to Greg Witman and/or Zach Witman, knife collection, keys to the residence, drug paraphernalia and other drug contraband." The grounds for probable cause were listed as follows:

> On October 2, 1998 at 3:19 p.m. your affiant and other investigative team members responded to 9 Albright Court, New Freedom Borough, Pennsylvania to a report of a homicide that had occurred at the residence. Located in the residence was the body of Gregory Witman, white male, thirteen (13) years of age. Investigation revealed that Gregory Witman was the victim of a homicide that had occurred between three (3:00) p.m. and three nineteen (3:19) p.m. Information obtained at the residence found that phones were used at the time

the report was received. A search of the residence and curtilage found a knife and gloves buried within the curtilage to the near of the residence. Investigation showed similar gloves were located within the residence. This search also disclosed a key within the crime scene of unknown personal possession. Interviews with friends and acquaintances of the occupants of the residence showed that calls were placed to the residence at or about the time of the homicide and that there may have been different phones used. Information obtained from interviews also showed that information concerning Gregory or Zachary's personal affairs and/or relationship may be stored on papers, records, and correspondence located within the residence. Investigation and interviews conducted revealed that there may be evidence of drug related activity by occupant(s) of the residence.

The Defendant claims that neither warrant stated with specificity the items to be seized, and therefore violates the Defendant's rights under the Fourth Amendment to the

United States Constitution as well as under Pennsylvania Law, and moves that the following items secured pursuant to these warrants be suppressed:

(1) One pair fabric gloves with "Brine" printed on them. Black in color: "Gloves were clearly listed as items to be seized, and the presence of gloves buried in the back yard gave the police probable cause to blive similar gloves might be located inside. Therefore, this item will be admitted. (2) One portable telephone base. Bn. Motorola: Search warrant L23621 described "phones and all related equipment." The probable cause to obtain telephones was based upon interviews with friends and acquaintances of the family and not upon improperly seized evidence. JTherefore, this items is admissible. (3) One shovel. App. 3 ft. In length. wooden handle: The Commonwealth concedes that this item was not sufficiently described by either warrant, and will therefore be suppressed. Commonwealth's Supplemental Memorandum of Law at 28. (4) One portable telephone. Bn. Panasonic. Gray in color: Again, telephones were properly described and probable cause did not arise from a tainted search or seizure.

This item is admissible. (5) Computer Tower. Bn. NEC. 311. 7Z021812US: This item was properly described in warrant number L23619 as "computers, and computer systems including central processing units; internal and peripheral storage devices such as fixed disks, external hard disks, floppy disk drives and diskettes." While the probable cause affidavit refers to the use of Luminol which illuminated a blood trail leading to a computer, the affidavit also relies on interviews that established that someone in the household had accessed an Internet account at the time of the homicide. As such, the doctrine of severance discussed above allows evidence to be admitted if it was based in part on probable cause which was validly obtained and properly described. Unlike the discovery of the computer through illuminated blood trails, the interviews did not arise out of illegally obtained evidence. Therefore, properly described computer related evidence is admissible. This item will therefore be admitted. (6) One UHS tape with "Seinfeld Last Episode" written on it: While this tape might seem to qualify as an "optical storage device" described in the search warrant, probable cause was based on someone logging onto the

Internet, and the belief that "information relating to the homicide investigation may be located on the above described computer devices." The police did not have probable cause to believe that a video tape was involved in the crime, and therefore this item cannot be admitted. (7) Two floppy diskettes, 3 ½ inch White in color: Computer equipment and disks were properly described and probable cause existed to seize them. These diskettes will be admitted. (8) One floppy diskette, 3 ½ inch, White in color: This diskette was properly described and will be admitted. (9) One White Lanyard with Sports FOBS attached: This item was not sufficiently described in either of the search warrants and must therefore be suppressed. (10) One Expandable Folder containing misc. Letters, Notes, Photographs and Contraband Fireworks: Warrant number L23621 described "papers, records, correspondence and notes pertaining to relating to Greg Witman and/or Zach Witman." If the Commonwealth can establish that these records, notes and photographs relate to Gregory or Zachary Witman then they may be admitted. While the fireworks were not properly described, it appears they were found in p lain view upon the seizure of properly

identified evidence. However, if the Commonwealth seeks to introduce such evidence, they must make a showing of relevance before such fireworks can be admitted. (11) One Knife Collection consisting of 15 knives and one UHS-C tape adapter: The knife collection was properly described, and the presence of the knife buried in the back yard was sufficient to establish probable cause. The knife collection will be admitted. The UHS-C tape adapter cannot be admitted however because, as stated above, the police did not have probable cause to suspect that video-related equipment was involved in the homicide. (12) Bag containing 22 compact discs and 50+ 3 ½ inch floppy diskettes: These were properly described and will be admitted. (13) Bag containing 1 NFC mouse and 1 Logiteck trackball: These were properly described as computer related items and will be admitted. (14) One Nylon Fanny Pack, Red in color, containing one Kwikset key and Ring: Keys to the residence were described in warrant L23621. Therefore, probable cause existed to seize this evidence and it will be admitted.

Next the Defendant moves to suppress a blue towel secured pursuant to search warrant

number L23623. The item to be seized as listed as "(1) one blue towel." The probable cause was described as follows:

> On October 2, 1998 at 1519 Hrs. Your affiant and other investigative team members responded to 09 Albright Ct., New Freedom Borough, PA. to a report of a homicide that had occurred at the residence. Located within the residence was the body of Gregory Witman, white male, thirteen (13) years of age. Investigation revealed that Gregory Witman was the victim of a homicide that had occurred between 1500 Hrs. And 1519 Hrs. During the investigation blood trails were located within the residence which were visible and were revealed through the use of a chemical substance called Luminol. These trails indicate that person)(s) moved through the house during the crime. Person(s) within the residence may have attempted to secret or destroy evidence of the crime. Your affiant believes that the blue towel may contain pertinent information relating to this homicide.

The Defendant argues that the facts and circumstances put forward to support probable cause do not explain with sufficient specificity the connection between the blue towel described and any evidence obtained therefrom. The warrant does describe the possibility that evidence could have been destroyed. This could be accomplished by cleaning up, wiping off hands, etc. As a towel could obviously be used for such a purpose, probable cause does exist and the item is admissible.

Pursuant to warrant number L24254, the following items were seized: (1) 3 Fingerprint Cards and 4 sheets of paper with palm prints; (2) 4 vials of blood, 2 Gray Stopper, 2 Purple Stopper; (3) 1 Urine Specimen (Retained by Lab).

The probable cause for this warrant states:

> On October 2, 1998 at 3:19 p.m. your affiant and other investigative team members responded to 9 Albright Court, New Freedom Borough, PA. to a report of a homicide that had occurred at the

> residence. Located within the residence was the body of Gregory Witman, white male, thirteen (13) years of age. Investigation revealed that Gregory Witman was the victim of a homicide that had occurred between three (3:00) p.m. and three nineteen (3:19) p.m. Investigation determined that Zachary Witman, based upon school records and statements made by Zachary, did not attend school on October 2, 1998, but was home ill on this date. Further investigation [sic] that Zachary Witman was the first individual to discover the victim's body.

This is sufficient ot establish that the police had probable cause to believe the Defendant was present at the time that the homicide took place, that the Defendant could have moved through the house at the time, and could have been in contact with the victim. The evidence obtained from the Defendant could be used to either identify him as a suspect or rule him out, or may impact on the mental or medical state of the Defendant at the time of the offense. As such, the police had probable cause to seize this evidence, which is

admissible.

Next, the Defendant moves to suppress 14 pages of information seized from the GTE company pursuant to warrant number L24252, which sought "records of al telephone calls sent and received at #9 Albright Court, New Freedom Borough, Pennsylvania 17349, subscriber: Ronald A. Witman [phone number omitted] and any other telephone lines servicing said residence for the period of September 15, 1998 through and including." The facts supporting probable cause were listed in pertinent part as: "Interviews with friends and acquaintances of the occupants of the residence showed that calls were placed to the residence at or about the time of the homicide and that there may have been different phones used." There is no indication why records dating back to September 15, 1998 would have any relevance to the events of October 2, 1998. As such probable cause does not exist for the entirety of these records. Only the telephone records from October 2, 1998 will be admitted unless further relevance is established.

The Defendant next moves to suppress a

door latch and window screens which were seized pursuant to warrant number L24257. The Court need not reach the issue of the validity of this warrant because the evidence was seized at the behest of Mr. Witman. N.T. 3/31/99 at 294-95. Therefore, this evidence is admissible.

The Defendant also requests that fingertip impressions seized pursuant to warrant number L24260 be suppressed. The probable cause affidavit reads in relevant part: "Further investigation showed that Zachary Witman was the first individual to discover the victim and one of the only, if not the only other individual within the house at the time of the homicide." The Defendant's presence in the house at the time of the homicide is sufficient to establish probable cause that the Defendant may have left fingertip prints in and around the crime scene. Therefore, the tip impressions will be admitted.

Next, the Defendant moves to suppress forty two pages of information obtained from America Online Corporation, and one zip disk containing data marked "AOL 10/22/98, RH

10/27/98," pursuant to warrant number L24261. The Defendant contends that the warrant is too general in that information obtained could apply to the parents of the Defendant, rather than the Defendant himself. To the extent that this information relates to the parents of the Defendant, it will be excluded. Otherwise, there was probable cause to seize information regarding their Internet account. Therefore, this item will be admitted.

The last items in contention that were seized pursuant to a warrant are one saliva sample and twenty pulled head hairs of the Defendant. The facts in support of probable cause in warrant number L24255 stated in relevant part: "investigation determined Zachary Witman, based upon school records and statements made by Zachary, did not attend school on October 2, 1998, and was home ill on this date. Further investigation showed that Zachary Witman was the first individual to discover the victim and one of the only, if not the only other individual within the house at the time of the homicide."

The Defendant claims that this does not described with sufficient specificity the

connection between the Defendant's head hairs and saliva and any relevant evidence derived therefrom. However, applying a common sense analysis leads the Court to conclude that there is probable cause to believe the Defendant was present in the household at the time that the homicide took place, that the Defendant could have moved through the house at the time, and could have been in contact with the victim. As with the other samples obtained from the Defendant, the evidence obtained could be used to either identify him as a suspect or rule him out.

Finally, the Defendant moves to suppress three statements given by him to Officer Siggins, Detective Goodfellow, and Detective Clancy. The Defendant claims these states were not given voluntarily, were made without the benefit of *Miranda* warnings, and are inadmissible hearsay.

For *Miranda* warnings to apply, a person must be subject to custodial interrogation. *Commonwealth v. Prosek*, 700 A.2d 1305 (Pa. Super. 1997). Whether a person is in custody for *Miranda* purposes depends o n whether the person is physically denied his freedom of

action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action is restricted by the interrogation. *Id.* The police officer's subjective intent does not govern the determination, but rather the reasonable belief of the individual being interrogated controls. *Id.*

In this case, the Defendant was never in custody while being questioned by any of the officers mentioned. Officer Siggins did not restrain the Defendant in any way, and asked him only a few, general investigatory questions. Under the circumstances, it was natural for the police to ask preliminary questions of the person who had called for help, and a person in the Defendant's place would not reasonably believe that such actions by the police amounted to "custody."

Likewise, the questioning by Chief Childs and Detective Goodfellow was of a general investigatory nature. The Defendant's movement was not restricted in any way, and there was nothing to suggest that the questioning was in any way coercive.

The Defendant was not in custody while Detective Clancy questioned him either. The Defendant's freedom of action was not hindered in any way by the Detective; the Defendant was not yet a suspect in the investigation; and the Detective mode of questioning was non coercive. See *Commonwealth v. Smith*, 382 Pa. Super. 288, 555 A.2d 185 (Pa. Super. 1989); *Commonwealth v. Fento*, 363 Pa. Super. 488, 526 A.2d 784 (Pa. Super. 1987) (even where the defendant was the subject of police investigation, defendant was in custody at the hospital where the officer did not restrain the defendant in any way).

Because the Defendant was not in custody, *Miranda* warnings were not required. Further, the statements are not inadmissible hearsay because admissions by a party are admissible as an exception to the hearsay rule. Pa.R.E. 803(25). Therefore, the Defendant's statements will be admitted.

An Order in keeping with this Opinion shall issue forthwith.

BY THE COURT,

DATE: s/_____
JOHN C. UHLER, PRESIDENT JUDGE

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA. :
:No. 5411 CA 1998
vs. :

ZACHARY WITMAN :

ORDER

AND NOW, this 7th day of May, 1999, the Court hereby Orders that the following items of evidence are suppressed:

(1) Blood sample from garage floor;
(2) Blood sample from tile just inside garage door to house;
(3) Table cloth from dining room table with blood on it;
(4) Hair from molding on kitchen side of kitchen/laundry room door;
(5) Welcome rug from foyer at front door;
(6) Sample of unknown substance from back gate (w/distilled water-air dried);
(7) Trash from kitchen trash compactor:
(8) Two knives from dishwasher in kitchen;
(9) Clump of napkins from trash compactor bag;

(10) Latent lift from inside front door (item #33 in Motion to Suppress);
(11) Latent lift from inside front door (item #34 in Motion to Suppress);
(12) Lift from inside of garage/laundry door;
(13) Outside latch from screen door on rear screen porch;
(14) Red "AP Long Lasting Mufflers" exacto type knife from bedroom of Zachary Witman;
(15) Defendant's white socks taken from pink plastic bag obtained at the hospital:
(16) Defendant's paints and underwear;
(17) Shovel, approx. 3 ft. In length, wooden handle;
(18) UHS tape with "Seinfeld Last Episode" written on it;
(19) White Lanyard with Sports FOBS attached;
(20) UHS-C tape adapter;
(21) Telephone records pertaining to dates other than October 2, 1998 unless further relevance can be established;
(22) "America Online" information pertaining to the Defendant's parents.

The Defendant's Motion with respect to the following items is Denied and the following will be admitted:
(1) Motorola portable phone from garage floor;

(2) blood sample from wall in house inside garage door;
(3) blood sample from tile floor inside kitchen;
(4) blood sample from the floor just before dining room;
(5) blood sample inside garage/laundry door;
(6) knife from dish drainer on counter beside kitchen sink;
(7) blood sample from foyer;
(8) blood sample from box in living room;
(9) blood spot on dining room carpet;
(10) blood sample from doorway from foyer/dining room;
(11) blood sample from inside front door;
(12) blood sample foyer floor;
(13) key from foyer floor;
(14) backpack from foyer floor;
(15) jacket from foyer floor;
(16) silver basket from foyer floor;
(17) silver dish from foyer door;
(18) rug from laundry room floor;
(19) blood from inside door handle-back door in laundry room;
(20) hand towel from powder room;
(21) hand towel from powder room;
(22) hand towel from kitchen on step stool;
(23) knife from wood block on counter;

(24) water from kitchen sink trap;
(25) water from powder room sink trap;
(26) NAPA knife wrapped in pair of dark socks [gloves] w/blood on from buried under pine tree at rear of house;
(27) soil sample from location where knife was buried;
(28) pink plastic bag with Defendant's sweatshirt enclosed;
(29) a white towel used by Defendant to wipe his hands;
(30) fabric gloves with "Brine" printed on them;
(31) portable telephone base, Bn. Motorola;
(32) portable telephone, Bn. Panasonic, Gray in color;
(33) Computer Tower, Bn. NEC, 311 7Z021812US;
(34) Two floppy diskettes, 3 ½ inch White in color;
(35) one floppy diskette, 3 ½ inch White in color;
(36) Expandable folder containing misc. Letters, Notes, Photographs and Contraband Fireworks, subject to a showing of relevance;
(37) knife collection consisting of 15 knives;
(38) bag containing 22 compact discs and 50+ 3 ½ inch floppy diskettes;
(39) bag containing 1 NFC mouse and 1 Logiteck

trackball;
(40) nylon Fanny Pack, Red in color, containing one Kwikset key and ring;
(41) one blue towel;
(42) 3 fingerprint cards and 4 sheets of paper with prints of the Defendant;
(43) 4 vials of blood from the Defendant - 2 Gray stopper, 2 Purple stopper;
(44) 1 Urine specimen from the Defendant;
(45) telephone records from October 2, 1998 (though records seized pertaining to other days may be admitted upon a showing of relevance);
(46) door latch and window screens seized October 9, 1998;
(47) fingertip impressions of the Defendant;
(48) "America Online" information not pertaining to the Defendant's parents;
(49) saliva sample and 20 pulled head hairs from the Defendant;
(50) Statements made by the Defendant to police officers and agents of the District Attorney's Office.

BY THE COURT,

s/_____
JOHN C. UHLER, PRESIDENT JUDGE